

Court-Connected Mediation of Parental Rights and Responsibilities in Ohio: The Impact of Interim Rule 81

I. INTRODUCTION

Divorce in the United States has become a common occurrence. Although the number of divorces has leveled off since the record high of 1980, the National Center for Health Statistics (NCHS) reported just under 1.2 million divorces in 1990.¹ The decision to divorce affects parties other than the married couple, in that of all divorces reported in this country, over half involve children.² The nation's court system has also been greatly affected by the increase in divorces, as "domestic relations cases are 36 percent of the total civil caseload . . . with divorce cases compris[ing] a third of all domestic relations cases."³ With the emergence of state no-fault divorce laws, courts began to look outside the traditional adversarial system for a better process to resolve disputes involving property and parenting responsibilities.⁴ An additional motivation for seeking new methods to handle divorce was concern over psychological harm to the family unit — especially to the children — caused by inflammatory divorce litigation.⁵ Thus, with the ever-increasing load imposed on the nation's courts, and with the goals of effective and efficient management of divorce-related cases, many courts responded by instituting mediation programs.⁶

Due to the potential impact a mediator has upon divorce mediation proceedings, the quality of the divorce mediator is an important element when assessing the effectiveness of divorce mediation. Mediators, especially when backed with the power of the court system, have much influence over the proceedings and, depending upon their style, can play a variety of roles, all of which exert slightly more influence on the process. The divorce mediator can be a neutral facilitator, advocator of settlement, promoter of a particular settlement, or even one who recommends a particular settlement

¹ Carol R. Flango, *A Statistical View of the Divorce Caseload in the Nation's State Courts*, 16 STATE CT. J. 6, 7 (1992).

² *Id.* at 6.

³ John A. Goerd, *Divorce Courts: A Summary of the Findings from or Study of the Pace of Litigation in Sixteen Urban Jurisdictions*, 16 STATE CT. J. 14, 14 (1992).

⁴ Henry W. K. Daley & Susan Keilitz, *Court-Based Family Mediation Programs*, 16 STATE CT. J. 24, 24 (1992).

⁵ Susan Myers et al., *Court-Sponsored Mediation of Divorce Custody, Visitation and Support*, 13 STATE CT. J. 24, 26 (1989).

⁶ *Id.*

to the court upon a stalemate between parties.⁷ Currently, disagreement exists about what type of educational background or experiential training a divorce mediator should have. Specifically, the battle concerns the relative merits of academic credentials compared to mediator experiences or training.⁸ In Florida, recent Supreme Court rulings are interpreted to require divorce mediators to be either trial court judges or attorneys with at least five years membership to the Florida bar.⁹ Given this trend to professionalize divorce mediation, where do other "qualified" professionals, such as those in mental health, belong? What about those volunteers with years of experience working with divorcing couples in community mediation centers?

These issues are being addressed currently in Ohio with the enactment of Ohio Revised Code § 3109.052¹⁰ and interim Rule 81.¹¹ Section II of this paper will give a brief overview of mediation in family courts and define related concepts to enable a fuller understanding of the processes available. Section III will set forth existing national principles and standards for ensuring mediator quality. Section IV will describe the history of Ohio's attempt to ensure mediator quality in court-connected parental rights and responsibilities disputes — interim Rule 81. Section V will describe a research project, currently under way at the Supreme Court of Ohio through the Director of Dispute Resolution programs, which promises to produce data from court-connected divorce mediation programs in Ohio's eighty-eight counties. The final section of the paper seeks to analyze the preliminary information gathered from this project, including data from urban and rural programs, to address the following issues:

1. Will the qualifications established by Rule 81 provide optimal training, educational background and experiences that will result in party satisfaction as well as cost savings to the court system and the parties?
2. What type of system exists to monitor the continued quality of mediators, and should this not be a priority if the program is connected to the court?
3. Should/can there be the same qualification/certification process for

⁷ *Id.*

⁸ Myers et al., *supra* note 6, at 26.

⁹ *Id.*

¹⁰ OHIO REV. CODE ANN. § 3109.052 (Baldwin 1993).

¹¹ C.P. Sup. R. 81. An amendment to the Rules of Superintendence for Ohio Courts of Common Pleas which sets minimum qualifications for divorce mediators.

both rural and urban areas given the difference in amount of tax dollars available for training?

II. MEDIATION IN FAMILY COURTS

Family mediation programs may be implemented statewide or by independent jurisdictions according to local statutes or court rules.¹² The goals of a court-connected mediation program are to reduce time and cost to parties and the court system, and to achieve a higher quality of dispute resolution.¹³ Recently, the State Justice Institute and the National Center for State Courts have been active in conducting research designed to determine whether divorce mediation is effectively achieving these goals.¹⁴

Mediation has been implemented in civil areas such as consumer, landlord-tenant, and labor and criminal disputes.¹⁵ Mediation is an out-of-court process whereby a neutral third party guides or facilitates negotiations between disputing parties. The mediator has no power to impose a solution, and the process is a voluntary means for the disputants themselves to form their own solution to their individual conflict.¹⁶ Many proponents of mediation believe that it is a less costly, more timely, and a more flexible system of resolving conflict compared to the adversarial system.¹⁷

Mediation aims to inspire compromise, and in the emotionally charged area of divorce where children are involved, compromise is a healthy environment for negotiating shared parenting responsibilities. Mediation helps disputing parties identify issues and increase communications while venting emotions, thereby clearing the way for possible solutions to the conflict.¹⁸ Because parents will always remain parents to their children, a continuing parental relationship must be maintained after the divorce.

¹² Myers et al., *supra* note 6, at 25.

¹³ Daley & Keilitz, *supra* note 4, at 24.

¹⁴ SUSAN L. KEILITZ ET AL., STATE JUSTICE INSTITUTE, MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING, SJI-89-03C-B-067 (1992); JESSICA PEARSON, FAMILY MEDIATION (National Symposium on Court-Connected Dispute Resolution Research Working Papers, 1993); NANCY THOENNES ET AL., STATE JUSTICE INSTITUTE'S EXECUTIVE SUMMARY OF THE EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION, SJI-89-03C-E-013 (1991).

¹⁵ Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 499 (1984).

¹⁶ See LEONARD RISKIN & JAMES WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 91 (abr. ed. 1988); JAY FOLBERG & ANN TAYLOR, MEDIATION 11 (1984) (defining the mediation process).

¹⁷ Pearson & Thoennes, *supra* note 15, at 499.

¹⁸ *Id.* at 498.

Mediation helps to preserve a relationship between parties through a win/win compromise as opposed to the positional win/lose adversarial outcome, which often serves to alienate parties.¹⁹

The three most common structures of a divorce mediation program are court-annexed programs, court-referred or sponsored programs, and private programs.²⁰ A court-annexed program is organized by the court; thus, the court maintains power over funding and the staff of the mediator program.²¹ Conversely, the court has no control over a private mediation program which is not organized, funded, or staffed by the court.²² A court-sponsored or court-referred program, however, has independent organization from the court, but may receive referrals and partial funding from the court.²³ The program may "mediate out" the court referrals or cases to independent mediators who are not paid by the court. A term inclusive of both court-annexed and court-sponsored or referred programs is court-connected programs.²⁴

Both the referral to mediation in court-connected programs and the actual mediation can be initiated through mandatory or voluntary procedures.²⁵ For example, a jurisdiction may have a mandatory referral or assessment provision but specify voluntary mediation, or may mandate both the referral and mediation, or allow referral at the judge's discretion. California was the first jurisdiction to mandate mediation of child custody and visitation disputes.²⁶ Some programs mandate mediation of particular pre-divorce decree issues, such as contested custody or visitation or "parental rights and responsibilities,"²⁷ while other programs mandate mediation for post-decree issues, such as support or visitation enforcement

¹⁹ Ann Milne, *Mediation: A Promising Alternative for Family Courts*, 1991 JUV. & FAM. CT. J. 61, 63.

²⁰ Myers et al., *supra* note 6, at 25.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ This term was chosen for the focus of this paper because it includes any program to which a court refers cases on a voluntary or mandatory basis, including those operated by the court and those mediated out. This term was chosen by an advisory board developing the National Standards for Court-Connected Mediation Programs. See *infra* text accompanying notes 76-91.

²⁵ Myers et al., *supra* note 6, at 25.

²⁶ Michelle Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 149 (1985); see CAL. CIV. CODE §§ 4351.5, 4607 (West 1983 & Supp. 1992).

²⁷ This term is becoming more common in an attempt to reduce the perception of children as property.

or modifications to custody.²⁸ Still other court-connected programs conduct mediation of all issues on a voluntary basis.²⁹

Although court-connected programs have a wide variety of organizational structures and purposes, one common goal of programs connected to the court system should be producing and maintaining a high degree of quality among the court staff and independent mediators. Quality can be ensured through control over those who are permitted to practice divorce mediation, such as certification or accreditation, as well as through the establishment of standards of practice for divorce mediators.

III. EXISTING GUIDELINES FOR DIVORCE MEDIATORS

With the development of divorce mediation programs as an alternative to the traditional adversarial legal process, concerns about the quality of the programs have developed. Proponents of mediation argue the necessity of maintaining the integrity of the "new" approach and avoiding public perception that mediation delivers a lesser quality of justice.³⁰ Additionally, concern for the protection of an uneducated public from incompetent practitioners is at issue.³¹ A related risk comes from the unrealistic expectations the uneducated consumer may bring to mediation, searching for the promises of a mediation panacea compared to the adversarial process and the subsequent disappointment and dissatisfaction realized if the process was not what was expected.³² No qualifications, common guidelines, or standards of practice have been established in order to become a divorce mediator. The possibility of unskilled and incompetent practitioners threatened the integrity of the field; therefore, many began to search for some uniform criteria for individuals practicing divorce mediation.³³

²⁸ Myers et al., *supra* note 6, at 25.

²⁹ Deis, *supra* note 26, at 151.

³⁰ *Report of the SPIDR Commission on Qualifications*, 1989 DISP. RESOL. F. 5, 5.

³¹ *Id.*

³² Thomas A. Bishop, *Standards for Family and Divorce Mediation*, 1984 DISP. RESOL. F. 3, 4.

³³ The Society of Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators, the American Bar Association's Family Law Section, the Association of Family and Conciliation Courts, the New Jersey Center for Public Dispute Resolution under a grant from the National Institute of Dispute Resolution, and the Center for Dispute Settlement in conjunction with the Institute of Judicial Administration have all undertaken projects to examine the question of qualifications and/or standards of mediators. The output of these institutions will be further elaborated in the text and materials *infra* notes 40-91. In addition to Ohio, legislatures among the states have also taken action to establish qualifications for practicing neutrals, including California, Florida, Iowa, Michigan, Minnesota, New York,

The concerns over regulating mediator qualifications have sparked a debate over the professionalization of the process among those in the field, legislators, and academics.³⁴ Some argue against the professionalization of mediation, concerned that it will interfere with the premise that the mediation belongs to the disputing parties.³⁵ Critics of professionalization of rule-making argue that uniform national standards will "restrict the growth of mediation,"³⁶ as mediation is more an art form than a science.³⁷ Opponents to professionalization are concerned that the increased costs of professionals would decrease the availability of mediation.³⁸ Further, the increased cost will serve to close the field to many competent practitioners and lay volunteers.³⁹

A. SPIDR's Basic Principles

The Society of Professionals in Dispute Resolution (hereinafter SPIDR), a leading professional association of neutrals, formed a commission to explore the issue of the qualifications of neutrals and published their recommendations to serve as a guide for legislators and institutions who aim to formulate standards for neutrals.⁴⁰ The report was inclusive both in output and input as a broad cross-section of interested parties were called upon to express their views. The resulting principles were not limited to one area or field of alternative dispute resolution. The Commission's rationale in favor of establishing criteria was the protection of both the consumer and the integrity of the dispute resolution process.⁴¹ The creation of inappropriate barriers into the field, the interference with innovative methods, and the limitation of the variety of skilled practitioners in society were recognized as substantive concerns against establishing mandatory standards. However, the Commission reasoned that with

Oklahoma, Texas, Virginia, and Wisconsin. *Report of SPIDR Commission on Qualifications*, *supra* note 30, at 5.

³⁴ Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125, 125 (1988).

³⁵ Bishop, *supra* note 32, at 4.

³⁶ *Id.*

³⁷ Lois Vanderkooi & Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAM. REL. 557, 558 (1983).

³⁸ Ronald M. Pipkin & Janet Rifkin, *The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 JUST. SYS. J. 204, 207 (1984).

³⁹ Shaw, *supra* note 34, at 125.

⁴⁰ *Report of the SPIDR Commission on Qualifications*, *supra* note 30, at 10.

⁴¹ *Id.* at 5.

statutory requirements already being enacted, the issue could no longer be avoided.⁴²

The following three principles were central to SPIDR's recommendations for qualifying neutrals:

1. No single entity (rather, a variety of organizations) should establish qualifications for neutrals;
2. The greater the degree of choice the parties have over the dispute resolution process, program, or neutral, the lesser the need for mandatory qualification requirements; and
3. Qualification criteria should be based on performance rather than paper credentials.⁴³

SPIDR's position on the qualifying entity is because different knowledge, techniques, and policies are necessary for the wide variety of disputes, allowing one body to establish the criteria for all neutrals could "restrict the development of different dispute resolution approaches" and should be avoided.⁴⁴ Rather, SPIDR suggests that both public and private qualifying entities should consider all interested groups, including consumers, practitioners, and those seeking to establish the standards when determining appropriate neutral qualification.⁴⁵ With voluntary programs, SPIDR favors a free market allowing consumers the opportunity to choose the process and the neutral, provided the disputants are furnished requisite information, including prior training and experience of the neutral and his personal and/or previous business relationships with parties. The neutral should be required to disclose financial interest affecting the cases, fees to be charged, applicable ethical codes adhered to, any bias felt by the neutral towards the case, and any prior disciplinary action taken against the neutral by any profession.⁴⁶ Alternatively, where mandatory programs are involved, SPIDR recommends that standards be set by qualifying entities and that information regarding the standards "be made available to the parties."⁴⁷ SPIDR recognized the need for impartial data and neutral qualifications and competence,⁴⁸ but recommended adherence to

⁴² *Report of the SPIDR Commission on Qualification*, *supra* note 30, at 7.

⁴³ *Id.* at 5.

⁴⁴ *Id.*

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 8.

⁴⁷ *Report of the SPIDR Commission on Qualification*, *supra* note 30, at 8.

⁴⁸ *Id.* at 10.

performance-based qualifications rather than formal educational credentials. The committee concluded that "no evidence [exists] that formal degrees are necessary to competent performance as a neutral" and that such requirements "create a significant barrier to the entry of many competent individuals into the profession."⁴⁹ SPIDR articulated some skills deemed necessary for competence, including the abilities to actively listen, analyze problems, identify and frame issues, communicate clearly using neutral language, show sensitivity to gender, ethnic, and cultural differences, understand power imbalances, demonstrate presence and persistence, and separate personal values from the process.⁵⁰ SPIDR states that continuing education of a neutral should be an obligation, and that trainers of neutrals should possess certain criteria, including qualifications of a practitioner and the ability to communicate and evaluate others in role plays.⁵¹ Linda R. Singer, the chair of SPIDR's Commission on Qualifications, stated that SPIDR's principles should be interpreted as the minimum requirements, but acknowledged that the lack of impartial data in the area of neutral qualifications and competency is a factor that cuts against minimum standards.⁵²

B. ABA Standards of Practice for Lawyer Mediators in Family Disputes

In 1984, the American Bar Association (hereinafter ABA) adopted standards of practice for family mediators/lawyers recommended by the Family Law Section of the Association.⁵³ These standards are not limited to divorce mediation, but extend to mediating all types of intra-family disputes.⁵⁴ The ABA neither advocated nor sanctioned divorce mediation for lawyers, but established certain standards of conduct for mediators to ensure ethical practice and certain limitations of permissible conduct.⁵⁵ The ABA felt the need to address the ethical boundaries of the practice of divorce mediation and to guide state bar associations in promulgating standards in order to protect the integrity of the legal profession since many mediators are practicing attorneys.⁵⁶ An additional consideration supporting

⁴⁹ *Report of the SPIDR Commission on Qualifications*, *supra* note 30, at 8-9.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 10.

⁵² *Producing Principles that Guide Standards*, 1989 DISP. RESOL. F. 11, 11.

⁵³ Bishop, *supra* note 32, at 3.

⁵⁴ Thomas A. Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461, 463 (1984).

⁵⁵ *Id.* at 461.

⁵⁶ *Id.* at 462.

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the appropriateness of the ABA's standards stems from the fact that divorce mediation involves the resolution of issues which inevitably involve legal questions. Thus, in order to promote and protect public welfare, the ABA has a duty to ensure public access to the law and ensure quality of the legal process.⁵⁷

The ABA Standards of Practice do not establish minimum qualifications for a family mediator, except that by definition, the mediator would be a lawyer, complete with formal training and credentials.⁵⁸ The Standards of Practice are "axiomatic norms" reflecting professional consensus of appropriate mediator behavior designed to educate and protect the public, similar to canons of any profession.⁵⁹ The six standards are:

- I. The mediator has a duty to define and describe the process of mediation and its cost before the parties reach an agreement to mediate.
- II. The mediator shall not voluntarily disclose information obtained through the mediation process without prior consent of both parties.
- III. The mediator has a duty to be impartial.
- IV. The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.
- V. The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants.
- VI. The mediator has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement.⁶⁰

⁵⁷ Bishop, *supra* note 54, at 462

⁵⁸ Qualification is mentioned only in the preamble, stating: "This process requires that the mediator be qualified by training, experience, and temperament; that the mediator be impartial; that the participants reach decisions voluntarily; that their decisions be based on sufficient factual data; and that each participant understands the information upon which decisions are reached." TASK FORCE ON MEDIATION SECTION OF FAMILY LAW AMERICAN BAR ASSOCIATION, DIVORCE AND FAMILY MEDIATION STANDARDS OF PRACTICE 1 (1984) [hereinafter ABA STANDARDS].

⁵⁹ Bishop, *supra* note 32, at 4.

⁶⁰ ABA STANDARDS, *supra* note 58, at 255.

The commentary prepared by the ABA Family Law Section states that the Standards of Practice express a policy statement of the American Bar Association and, as such, have no direct coercive effect on practicing lawyer-mediators.⁶¹ The ABA intends that the Standards of Practice be used as a model for state and local bar associations, as well as organizations of lawyer-mediators.⁶²

C. The Association of Family and Conciliation Courts' Model Standards of Practice for Family and Divorce Mediators

A similar model standards of practice developed from symposia held by the Association of Family and Conciliation Courts (hereinafter AFCC).⁶³ These standards are also offered as a model for government or professional bodies authorized to qualify or regulate mediators. The preamble to the model standards states that the "standards are intended to assist and guide public and private, voluntary and mandatory mediation."⁶⁴ Unlike the American Bar Association Standards of Practice, of Pinetia, the AFCC model standards have a training and education provision which states that "A mediator shall acquire substantive knowledge and procedural skill in the specialized area of practice. This may include but is not limited to family and human development, family law, divorce procedures, family finances, community resources, the mediation process, and professional ethics."⁶⁵

Other provisions of the AFCC model standards include initiating and terminating procedures, the impartiality and neutrality of the mediator, costs and fees, confidentiality and exchange of information, full disclosure of information, party responsibility of self-determination, and mediator responsibility to third parties affected by agreements. Additional provisions encourage professional advice and enhance the parties' ability to negotiate. These provisions also provide for advertising activities advancing or promoting mediation and the responsibility of mediators toward other professionals.⁶⁶ The value of the model standards can be seen as educational in that they allow potential participants to assess the process in order to determine whether it will be conducive to their needs and expectations.⁶⁷ Additionally, the standards can reassure that divorce mediation can be used in conjunction with, and not merely as an alternative to, obtaining

⁶¹ ABA STANDARDS, *supra* note 58, at at 255-61.

⁶² *Id.*

⁶³ Bishop, *supra* note 32, at 3.

⁶⁴ *Id.* at 7.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 7-9.

⁶⁷ *Id.* at 5.

individual legal advice.⁶⁸

D. The Academy of Family Mediator Practitioner Qualifications

In 1992, the Academy of Family Mediators issued a policy statement concerning the qualifications for family mediators.⁶⁹ The Academy is currently developing a voluntary family mediator certification program to ensure family mediator competency both in private and public sectors. The Academy recommends that until the certification program is implemented, the Academy's training and experience requirements for practitioner members should be considered as interim qualification standards for family mediators.⁷⁰ The training requirements for practitioner membership include a minimum of sixty hours of family mediation training, with at least thirty of those hours consisting of integrated family mediation process training and the remaining hours of training in the mediator's area of practice.⁷¹ Additionally, the Academy requires a two-hour training in sensitivity to domestic violence issues.⁷² The Academy's experience requirement consists of at least 100 hours of face-to-face family mediation experience in a minimum of ten different mediations.⁷³ The Academy further requires a continuing education requirement of twenty hours every two years.⁷⁴ The Academy recognizes that qualified family mediators exist who are not Academy practitioner members, and it supports a free market for competent family mediators; however, it encourages consumers to consider strongly whether a practitioner is an Academy practitioner member or has similar training and experience.⁷⁵

E. National Standards for Court-Connected Mediation Programs

In a joint program funded by the State Justice Institute, the Center for Dispute Settlement, and the Institute of Judicial Administration developed standards for "court-connected"⁷⁶ mediation programs. The National

⁶⁸ Bishop, *supra* note 32, at 5.

⁶⁹ Memorandum from Jim Melamed, Executive Director, to members of the Academy of Family Mediators inquiring about Family Mediation Qualifications and Legislation (Sept. 15, 1992) (on file with author) [hereinafter Memorandum from Jim Melamed].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Memorandum from Jim Melamed, *supra* note 69.

⁷⁵ *Id.*

⁷⁶ "Court-connected" is defined in the standards as any program or service, including a

Standards for Court-Connected Mediation Programs were developed as a guide for such programs at the trial court level for use in all types of cases.⁷⁷ The commentary introducing the National Standards states that they "reflect the best thinking currently about what constitutes quality in court-connected mediation programming efforts," and that "their publication should promote thoughtful dialogue about the critical issues they address."⁷⁸ The National Standards are a thorough compilation of issues which may pertain to a program's operation, from access to mediation to program evaluation.⁷⁹ The position taken by the National Standards regarding a court's responsibility for mediator quality depends on whether the program is organized, referred by the court, or is a program outside the court. For the latter, the National Standards recommend no court responsibility for mediator quality, but for mediators both employed by or referred to by the court, the National Standards recommend full responsibility for monitoring mediator quality.⁸⁰

The rationale stated is that "[t]he more closely connected to the court an alternative dispute resolution program is, the higher the degree of control the court should exercise."⁸¹ The National Standards adhere to the SPIDR basic principles.⁸² Section 6-1 of the Standards states that:

Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.⁸³

The National Standards list the skills and personal qualities recognized

service provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court.

⁷⁷ CENTER FOR DISPUTE SETTLEMENT & THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, at ii [hereinafter NATIONAL STANDARDS].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* § 2-1.

⁸¹ Conference of State Court Administrators Committee on Alternative Dispute Resolution, *Report to the Membership* 3 (Dec. 11, 1990) (draft) [hereinafter COSCA report].

⁸² See *supra* text accompanying notes 40-52.

⁸³ NATIONAL STANDARDS, *supra* note 77, § 6-1.

by SPIDR⁸⁴ as necessary for competent neutral performance.⁸⁵ The National Standards clearly articulate the belief that personal characteristics, rather than education or profession, are related to mediator competence, and that the only criteria which have been correlated with successful mediation are skills attained through training, experience, and skills-based education.⁸⁶ This position has also been set forth by the Panel on Qualifications of the New Jersey Center for Public Dispute Resolution, a center handling statewide public interest disputes such as environmental and public policy disputes. The Panel stated that "The guidelines recommended for selecting and developing mediators in public interest disputes reflect the broad view that competence should be measured in terms of human skills and demonstrated performance, rather than by technical abilities and theoretical knowledge."⁸⁷

With the acknowledgment that certain types of cases require more training and experience, such as divorce and child custody cases, the National Standards make no recommendation as to quantity of training or experience hours required.⁸⁸ While certification training programs are not necessary, the National Standards recommend that court-connected mediator training should include role-playing and feedback.⁸⁹ Finally, the National Standards state that courts have a responsibility to monitor the performance of court-connected mediators in order to maintain quality and ensure that continuing education has equal importance to the initial qualification process.⁹⁰ When substandard mediator performance has not been corrected, the National Standards recommend a removal process, which includes due process components of fair notice and a hearing.⁹¹

In this national context of private, professional, and public policy statements regarding the qualifications and guidance standards of practice for mediators, Ohio legislative and judicial bodies entered the arena and undertook the responsibility of establishing minimum qualifications for mediators of contested divorce cases involving child custody and visitation issues.

⁸⁴ See *supra* text accompanying note 50.

⁸⁵ NATIONAL STANDARDS, *supra* note 77, § 6-2.

⁸⁶ *Id.* See, e.g., Jessica Pearson et al., *Mediation of Contested Child Custody Disputes*,

11 COLO. LAW. 336 (1982).

⁸⁷ Shaw, *supra* note 34, at 136.

⁸⁸ NATIONAL STANDARDS, *supra* note 77, § 6-1.

⁸⁹ *Id.* § 6-4.

⁹⁰ *Id.* § 6-6.

⁹¹ *Id.*

IV. OHIO'S INTERIM RULE 81: QUALIFICATIONS OF MEDIATORS IN DISPUTES CONCERNING CUSTODY OR VISITATION

Mediation, along with the alternative dispute resolution movement, gained momentum in Ohio on August 28, 1989, when Chief Justice Thomas J. Moyer of the Supreme Court of Ohio announced the creation of the Supreme Court Committee on Dispute Resolution, whose purpose was to explore alternative methods of resolving disputes.⁹² An Administration Subcommittee was mandated to review issues such as mediator qualification, confidentiality, and immunity, and to report its recommendation to the Court.⁹³ On September 7, 1990, a public hearing was held in Columbus, the state capital, to discuss the issue of mediator qualifications for mediators in child custody and visitation cases.⁹⁴

In 1991, the Ohio General Assembly passed Substitute Senate Bill 3,⁹⁵ which contained among its provisions legislation enabling a court to order mediation in cases involving differences as to the allocation of parental rights and responsibilities in cases of divorce.⁹⁶ Although disputants in approximately thirty-three states are mandated to mediate contested custody and visitation cases by either "state statute or administrative court rule,"⁹⁷ the Ohio statute is permissive, allowing judges to order mediation at their discretion.⁹⁸ Included within the language of the statute is a mandate for local courts with custody and visitation mediation programs to establish qualifications and standards of conduct for the mediator.⁹⁹

Because of the parallel development of the Supreme Court Committee

⁹² Preliminary Report of the Committee on Dispute Resolution to the Supreme Court of Ohio iii (Sept. 1991) [hereinafter Report].

⁹³ *Id.*

⁹⁴ See generally Report, *supra* note 92. (Testimony was heard from Jeanne A. Clement, Ed.D., R.N., Judge June Rose Galvin, Vanessa K. Jensen, Psy.D., Richard A. Castellini & Cathleen E. Kreiner, Helen K. Cleminshaw, Ph.D., Victoria E. Solomon, M.S.S.A., J.D., Gary W. Paquin, J.D., Ph.D., Judge Joseph C. Zieba & Judge David A. Basinki, John Polanski & Judge John J. Leskaviansky, Maggie Abel, and J. Michael Watkins. Testimony on file with Coordinator of Dispute Resolution Programs of Supreme Court of Ohio.).

⁹⁵ 1991 Ohio Legis. Serv. 143 (Baldwin).

⁹⁶ OHIO REV. CODE ANN. § 3109.052 (Baldwin 1993).

⁹⁷ Milne, *supra* note 19, at 71.

⁹⁸ OHIO REV. CODE ANN. § 3109.052(A) (Baldwin 1993).

⁹⁹ The statute reads, in relevant part: "Any mediation procedures adopted by local court rule for use under this division shall include, but are not limited to, provisions establishing qualifications for mediators who may be employed or used and provisions establishing standards for the conduct of the mediator." OHIO REV. CODE ANN. § 3109.052(A) (Baldwin 1993).

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on Dispute Resolution and the progress of Substitute Senate Bill 3, the legislation ultimately provided language that allowed Supreme Court and local court regulation of qualifications and standards of practice for mediators in mediations involving the allocation of parental rights and responsibilities.¹⁰⁰ The Supreme Court responded to Ohio Revised Code § 3109.052 by promulgating Rule 81, an interim rule effective July 29, 1992, to the Rules of Superintendence for Courts of Common Pleas, which govern domestic relations courts in Ohio.¹⁰¹ Interim Rule 81 established minimum qualifications for court-connected mediators of child custody and visitation disputes, and required courts adopting parental rights and responsibility mediation programs to file a plan with the court.¹⁰² The Rule was published for public comment on May 13, 1991, in the *Ohio Advance Sheets*, Vol. 59, No. 4, and the public was instructed to submit comments regarding the proposed interim rule before June 12, 1991.¹⁰³ After

¹⁰⁰ Telephone interview with Bill Weisenberg, Ohio state legislator (Mar. 3, 1994).

¹⁰¹ C.P. Sup. R. 81.

¹⁰² *Id.*

¹⁰³ Report, *supra* note 92, at 28. The text of the rule was as follows:

Rule 81. QUALIFICATION OF MEDIATORS IN DISPUTES CONCERNING CUSTODY OR VISITATION

(A) EACH DIVISION OF THE COURT OF COMMON PLEAS HAVING JURISDICTION TO DETERMINE THE ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES FOR THE CARE OF, OR VISITATION WITH, MINOR CHILDREN SHALL CONSIDER, AND MAY ADOPT, A PLAN FOR MEDIATION OF DISPUTES OVER THE ALLOCATION OF PARENTAL RIGHTS AND RESPONSIBILITIES FOR THE CARE OF, AND VISITATION WITH, MINOR CHILDREN.

(B) PURSUANT TO THE PLAN, ANY MEDIATOR EMPLOYED BY THE COURT, OR TO WHOM THE COURT MAKES REFERRALS, SHALL HAVE THE FOLLOWING MINIMUM QUALIFICATIONS:

(1) AN UNDERGRADUATE DEGREE AND AT LEAST TWO YEARS OF PROFESSIONAL EXPERIENCE WITH FAMILIES. "PROFESSIONAL EXPERIENCE WITH FAMILIES" INCLUDES COUNSELING, CASEWORK, LEGAL REPRESENTATION IN FAMILY LAW MATTERS, OR EQUIVALENT EXPERIENCE AS IS SATISFACTORY TO THE COURT.

(2) COMPLETION OF AT LEAST FORTY HOURS OF

reviewing commentary received from interested parties, the Supreme Court Committee on Dispute Resolution concluded that the interim rule should be modified and the following recommendations and concerns provided to the court for its review.¹⁰⁴

The Committee summarized the areas of major concern as (1) education; (2) domestic violence; (3) Academy of Family Mediation standards; and (4) training.¹⁰⁵ Several courts responded to the original undergraduate degree educational requirement; those courts believed that the rule would exclude from qualification those who had prior training and experience, but no undergraduate degree. In an attempt to balance concerns of excluding otherwise qualified mediators with allowing incompetent mediators to practice, the committee amended the wording of the Rule to include an undergraduate degree *or equivalent educational experience*.¹⁰⁶

Further commentary received by the Committee argued that although the standards set by the Academy of Family Mediators (AFM) are well known and comprehensive, many are more applicable to a training program than to mediator qualifications.¹⁰⁷ Therefore, the Committee deleted reference to the AFM Standards, replacing the trainer accreditation requirements with a requirement that mediator training be conducted "in a

SPECIALIZED FAMILY OR DIVORCE MEDIATION TRAINING
CONDUCTED BY A TRANSFER ACCREDITED BY THE ACADEMY OF
FAMILY MEDIATORS, OR OTHER TRAINING AS IS SATISFACTORY
TO THE COURT.

(3) ELIGIBILITY FOR MEMBERSHIP IN APPROPRIATE
PROFESSIONAL ASSOCIATIONS, ADHERENCE TO THE ETHICAL
STANDARDS OF THE MEDIATOR'S PROFESSION, AND ADHERENCE
TO THE STANDARDS ESTABLISHED BY THE ACADEMY OF FAMILY
MEDIATORS, DATED JANUARY 1, 1982.

(4) MAINTENANCE OF APPROPRIATE LIABILITY INSURANCE
SPECIFICALLY COVERING THE ACTIVITIES OF THE INDIVIDUAL AS
A MEDIATOR.

(C) EVERY PLAN ADOPTED PURSUANT TO THIS RULE SHALL BE
FILED WITH THE SUPREME COURT PURSUANT TO RULE 9 OF THE
RULES OF SUPERINTENDENCE FOR COURTS OF COMMON PLEAS.

¹⁰⁴ Report, *supra* note 92.

¹⁰⁵ *Id.* at 26-27.

¹⁰⁶ *Id.* at 28.

¹⁰⁷ *Id.* at 27.

program approved by the Commission on Continuing Legal Education in accordance with administrative guidelines established by the Committee on Dispute Resolution."¹⁰⁸ The final revision to the original rule resulting from the public commentary was the replacement of the reference to AFM standards with adherence to the ethical standards of the mediator's profession.¹⁰⁹ The Committee recommended an interim rule to allow for analysis and evaluation of future needs of court-connected programs.¹¹⁰

After two years, the Supreme Court adopted Rule 81 effective September 7, 1992 to July 1, 1994.¹¹¹ The Supreme Court Committee on Dispute Resolution will be evaluating the effectiveness of the minimum qualifications established by interim Rule 81 during the second half of 1994 in order to make recommendations to the Court about whether the rule should be further modified or permanently adopted in early 1995. There has been no empirical data to date by private researchers regarding any causal connection between the qualification established by interim Rule 81 and mediator competency or effectiveness. However, the Director of Dispute Resolution Programs at the Supreme Court of Ohio is currently developing a survey with the hopes of gaining some insight into the effectiveness or non-effectiveness of interim Rule 81 in Ohio court-connected parental rights and responsibilities mediation programs. The survey promises to obtain information from the eighty-eight counties in Ohio, such as what training and experience or educational backgrounds of mediators may be related to mediator competency and effectiveness of the process as measured by settlement rate and party satisfaction. Questions such as whether it is possible to require a specific laundry list of mediator qualifications in both rural or less funded court programs and in urban, well funded programs without denying access will be investigated. An additional quality issue to be addressed is whether a process to monitor mediator competency can be developed.¹¹² To date, only preliminary data has been obtained through two

¹⁰⁸ Proposed Amendment to the Rules of Superintendence for Courts of Common Pleas-Proposed C.P. Sup. R. 81 (Proposed Rule) in Report, *supra* note 92, at 29. The committee submitted the proposed commission on continuing legal education accreditation standards for mediator training programs to the court simultaneously with the proposed amendment for Rule 81. *Id.* at 30.

¹⁰⁹ Report, *supra* note 92, at 29.

¹¹⁰ *Id.* at 27.

¹¹¹ According to C. Eileen Pruett, the Supreme Court Committee on Dispute Resolution will be recommending that the interim period for Rule 81 be extended until July 1, 1995. Interview with C. Eileen Pruett, Director of Dispute Resolution Programs at the Supreme Court of Ohio, Columbus, Ohio (Mar. 3, 1994).

¹¹² Memorandum from Nancy Rogers to Eileen Pruett, *et al.*, Director of Dispute Resolution Programs, the Supreme Court of Ohio (Nov. 2, 1993) (on file with the recipient).

informational surveys sent out to all Ohio county courts, but some general information may be related in anticipation of the survey results, which are expected upon completion of the exit survey project.

V. COURT-CONNECTED DIVORCE MEDIATION PROGRAMS IN OHIO

A. Divorce Statistics in Ohio's Courts

In 1993, there were 83,420 new divorce cases filed in Ohio's Domestic Relations Division court system.¹¹³ In addition to the number of new domestic cases were cases transferred or reactivated, bringing the total number of cases in Ohio's Domestic Relations Division in 1993 to 179,606.¹¹⁴ Of this total, only 140,031 were terminated in 1993, with 41,891 cases ending by trial, and only 496 ending by mediation or conciliation procedures.¹¹⁵ Twenty percent of the cases terminated by mediation involved changing the custodial parent where children are involved.¹¹⁶ Thus, with the newly enacted legislation providing for mandatory mediation of parental rights and responsibilities at the judge's discretion,¹¹⁷ only a very small percentage of domestic cases was terminated by mediation in 1993.¹¹⁸

B. Director of Dispute Resolution Programs of the Supreme Court of Ohio's Exit Survey

In 1993 and 1994, the author and C. Eileen Pruett, the Director of Dispute Resolution Programs of the Supreme Court of Ohio, gathered data

Possible additional issues which may be explored through the survey are: (1) the effects the funding of the programs or methods of changing have on access by parties with different income levels; (2) the effects on party satisfaction and settlement rates of participation by other parties such as lawyers and children; (3) the effects of the program on cost to parties and the court system; (4) the effects of mediation on children — does it prove to be in their best interest; (5) the effects of premediation assessment conferences on settlement and party satisfaction; and (6) the effects of parent education sessions on settlement. *Id.*

¹¹³ OHIO COURTS SUMMARY 1993, 12A (1993). This figure has continuously decreased since 1989 when it was 130, 869; 1990—105,273; 1991—99,871; and 1992—95,648. *Id.*

¹¹⁴ *Id.* at 1F.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ OHIO REV. CODE ANN. § 3109.052 (Baldwin 1992).

¹¹⁸ This figure is 3542%, which was a slight increase in the total percentage of domestic cases terminated by mediation from 1992's .3482%. *Id.*

from the eighty-eight counties in Ohio to determine where court-connected divorce mediation programs exist. Initial informational surveys were sent out in the summer of 1993 and 1994 to all county domestic courts, and as of September 1994, eighty counties had responded.¹¹⁹ This information will be reviewed in the coming months to develop a detailed questionnaire to be sent to divorce mediation programs and answered following each mediation. This exit survey is still in development, but in its current form there are three parts.¹²⁰ The first part is to be answered by each participant of the mediation and seeks to obtain the party's perception of satisfaction, fairness, and quality of the process.¹²¹ Additionally, demographic information is sought of participants, including gender, education, and race, as well as some specifics pertaining to the marriage.¹²² The second part of the exit survey is to be answered by the mediator and seeks to obtain the mediator's qualification, including educational and experiential background and the requirements established by Rule 81.¹²³ The final part of the survey is also to be answered by the mediator and seeks to obtain the mediator's perceptions of the particular case.¹²⁴

It is the goal of the Director of Dispute Resolution Programs that the survey will produce detailed information over the coming year on the success of court-connected divorce mediation programs. It is anticipated that this information will provide valuable data which will allow the Supreme Court Committee on Dispute Resolution to evaluate the success of existing programs and to identify issues which may need to be addressed to ensure continued quality of divorce mediation programs.

VI. MEDIATOR QUALIFICATIONS IN OHIO: PRELIMINARY DATA FROM INITIAL INFORMATIONAL SURVEYS

Of the eighty counties responding to the survey in 1993, twenty answered that they operated court-connected divorce mediation programs.¹²⁵ While the 1994 follow up survey had fewer counties responding — 48 overall — the total number of divorce mediation programs reported

¹¹⁹ This preliminary information will be discussed in section VI of this paper.

¹²⁰ Supreme Court of Ohio Domestic Mediation Data Form (on file with Director of Dispute Resolution Programs of the Supreme Court of Ohio).

¹²¹ Supreme Court of Ohio Domestic Mediation Data Form (on file with Director of Dispute Resolution Programs of the Supreme Court of Ohio).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Domestic Mediation Survey (June 1993) on file with the author and C. Eileen Pruett, Director of Dispute Resolution Programs, Supreme Court of Ohio.

increased by 5, for a total of 25.¹²⁶ An additional seven counties reported that they are considering similar programs¹²⁷ and four counties are currently developing divorce mediation programs.¹²⁸ Thus, as of September 1994, over 40 percent of Ohio counties have or are considering implementing divorce mediation programs in their domestic courts.¹²⁹

Of the ten urban counties conducting divorce mediation programs, three are within the court system, or in-house, three are mediated, or referred out, and four courts both mediate in-house and refer out. Of the fifteen rural counties reporting divorce mediation programs, only four are in-house, while the remaining ten are handled through referrals to outside entities. Thus, it appears that although there are more rural programs (15), a factor probably accounted for due to the majority of rural counties in Ohio, than urban programs (10), significantly more programs (10 of 15) are exclusively mediated out in rural counties than in urban counties (2 of 10). This could be accounted for by lack of funding in rural areas as they opt for the less costly alternative of court-referred programs instead of court-annexed programs which are funded and staffed by the court. This hypothesis was supported by survey data in that only five rural counties reported adequate funding for their current mediator training, and four of the five¹³⁰ are the four in-house rural mediation programs reported in the survey. Only one urban court reported adequate funding for mediator training, and that court, in Lorain County, is an in-house program as well.

The counties were asked to supply their current mediator qualifications, as well as those minimum qualifications believed to be necessary for the competent practice of divorce mediation. The minimum qualifications of interim Rule 81 were used as a starting point, and include a bachelor's degree or the equivalent in experience, a minimum of forty hours of divorce mediation training, at least two years of experience with families, and mediator malpractice insurance.

Of the fifteen rural programs, only two — Athens and Logan — both of which are referred out, reported complete compliance with interim Rule 81 minimum mediator qualifications. However, Fayette, Muskingum, and Ottawa lack only the requirement of mediator malpractice, which may be

¹²⁶ Those rural counties reporting programs include Athens, Clinton, Columbiana, Erie, Fayette, Gallia, Hancock, Hocking, Logan, Marion, Muskingum, Ottawa, Trumbull, Van Wert, and Wood. Those urban counties reporting programs include Butler, Cuyahoga, Franklin, Hamilton, Lorain, Lucas, Mahoning, Montgomery, Stark, and Summit.

¹²⁷ Crawford, Greene, Mercer, Morgan, Perry, Warren, and Wyandott.

¹²⁸ Ashtabula, Lake, Richland, and Washington.

¹²⁹ Domestic Mediation Survey (June 1994), on file with author and C. Eileen Pruett, Director of Dispute Resolution Programs, Supreme Court of Ohio [hereinafter 1994 Survey].

¹³⁰ Erie, Fayette, Muskingum, and Ottawa.

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met due to their in-house status since in-house mediators could be protected under the court's immunity. The interim Rule 81 requirements most often met are the educational requirements, as thirteen programs require mediators to obtain a bachelor's degree or equivalent in experience,¹³¹ and thirteen require at least forty hours of mediation training.¹³² Four rural programs require the additional education of a graduate degree,¹³³ but an equal number of courts¹³⁴ believe that equivalent experience is sufficient education. Thus, the survey data appears to indicate that the national debate surrounding the necessity of formal education versus experience for qualified divorce mediators can be seen among the rural counties reporting divorce mediation programs in Ohio.

Seven rural programs¹³⁵ reported requiring mediators to have at least two years of experience working with families, but at least eight counties indicated that this requirement should be expanded to include even more experience with families.¹³⁶ The requirement least met by rural mediation programs is that of mediator malpractice insurance. Only five of the fifteen programs¹³⁷ reported compliance with this requirement. However, as mentioned previously, in-house programs, such as those in Erie, Fayette, Muskingum, and Ottawa Counties, may be protected under general court immunity provisions. Thus, the requirement of independent mediator coverage will depend on whether a program is referred out or is in-house and covered as part of the court system.

Three rural programs¹³⁸ adhere to the Academy of Family Mediator Practitioner Qualifications which, as previously mentioned, are more rigorous than those qualifications required by Ohio's interim Rule 81. However, five rural counties believe that the Academy of Family Mediator Practitioner Qualifications should be minimally required, thereby indicating

¹³¹ Athens, Clinton, Columbiana, Erie, Fayette, Gallia, Logan, Marion, Muskingum, Ottawa, Trumbull, Van Wert, and Wood.

¹³² Athens, Clinton, Columbiana, Erie, Fayette, Hocking, Logan, Marion, and Ottawa require 40 hours of training, while Gallia, Muskingum, Trumbull, and Wood require more than 40 hours of training.

¹³³ Logan, Muskingum, Van Wert, and Wood. It should be noted that only two rural courts believed that a graduate degree was necessary for the minimum training requirements for a divorce mediator.

¹³⁴ Athens, Clinton, Marion, and Van Wert.

¹³⁵ Athens, Columbiana, Fayette, Logan, Muskingum, Ottawa, and Trumbull.

¹³⁶ Only two counties, Fayette and Marion, indicated that this requirement should be reduced.

¹³⁷ Athens, Clinton, Hocking, Logan, and Marion.

¹³⁸ Columbiana, Fayette, and Hancock.

the desire for more training. Additionally, six programs¹³⁹ require some continuing education requirement for divorce mediators in order to ensure some measure of quality control. Further, an overwhelming majority — eleven of the fifteen rural programs — believe that there should be some type of continuing education required as a device to monitor continued mediator competence.

Of the ten urban programs, eight report compliance with interim Rule 81 minimum mediator qualifications.¹⁴⁰ The Lorain program lacks only the mediator malpractice insurance requirement for complete compliance with the interim Rule. Lucas County is the sole urban program requiring a mediator to obtain a graduate degree before mediating divorce cases, although the interim Rule's two-year experience requirement and malpractice insurance requirement are not met. Lucas County is also one of four urban counties, along with Butler, Hamilton, and Summit, believing that the Academy of Family Mediator Practitioner Qualifications should be required. Only Hamilton and Summit Counties, however, currently require Academy of Family Mediator qualification for divorce mediators.

Five urban counties¹⁴¹ require continuing divorce mediation education, but all ten urban programs believe that divorce mediators should be required to maintain some type of continuing education. Thus, both rural and urban programs report a desire to monitor the quality of divorce mediators through mandatory continued training.

Eighty percent of the urban counties report compliance with interim Rule 81 minimum requirements as opposed to only thirteen percent of the rural programs.¹⁴² A related factor may be that there are more urban programs than rural programs that are court-annexed, or are in-house at least in part. Eight of the ten urban programs have some in-house mediators, while only five of the fifteen rural programs report in-house mediators.¹⁴³ This may indicate that those programs controlled in house by the court may have the power to exert greater control over who is determined to be qualified as a divorce mediator. It also may be indicative of a funding difference in that those urban programs receiving more tax dollars may have more resources to spend on meeting mediator training requirements set by the Supreme Court of Ohio.

¹³⁹ Clinton, Columbiana, Fayette, Logan, Trumbull, and Van Wert.

¹⁴⁰ Butler, Cuyahoga, Franklin, Hamilton, Mahoning, Montgomery, Stark, and Summit.

¹⁴¹ Franklin, Hamilton, Lucas, Mahoning, and Montgomery.

¹⁴² 1994 Survey, *supra* note 129.

¹⁴³ It should be noted that the two urban programs, Lucas and Lorain, not complying with interim Rule 81 are in-house programs.

VII. CONCLUSION: ENSURING MEDIATOR QUALITY IN OHIO DOMESTIC COURT PROGRAMS

The issue of maintaining mediator competence is clearly of great concern for any mediation program, but when the issues and relationships are as complex and volatile as in cases of divorce where families are involved, consumer protection needs to be at its highest. Recognizing this, the Supreme Court was called upon to promulgate some minimum standards — Rule 81 — to attempt to ensure divorce mediator competence.

Other procedures promising to monitor the quality of divorce mediators include mediation evaluation mechanisms, such as interviews or surveys to be completed by participants following a mediation. Currently, only eight counties¹⁴⁴ have implemented some type of mediator and participant evaluation interview or exit survey. The Mahoning County program reports that a similar device is in preparation. As previously mentioned, the Ohio Supreme Court Committee on Dispute Resolution has been developing a state-wide exit survey to attempt to create significant statistical information regarding divorce mediation programs. The survey promises to compare programs across the state to provide some indication of how successful the process and the mediator are perceived to be. While "success" is an ambiguous term, the survey measures participant perceptions of fairness and outcome satisfaction in an attempt to define the intangible qualities of a successful mediation. It is anticipated that the data obtained from this exit survey program will provide valuable statistical information lacking to date on divorce mediation and its success in Ohio's court systems.

However, this project has yet to begin and interim Rule 81 is up for consideration in the latter part of 1994. Public hearings are scheduled to be held October 13, 1994 at the Ohio State Bar Association, where testimony will be heard regarding the issues presented by the interim Rule. Expected topics include the necessity of the requirement for formally-educated mediators versus experienced lay persons or volunteer mediators lacking a college degree. Other issues expected to be raised include the necessity of malpractice insurance versus the hardship it may impose, since only thirteen of the twenty-five¹⁴⁵ programs require it. Still another issue involves the minimum length of the training period, as well as the content of the training, for divorce mediators. Currently, the rule sets a forty hour minimum training requirement to be completed through a court-approved training program. Eleven courts indicated the need for mediator training of at least forty hours, with six courts asking for even more training hours.

¹⁴⁴ Butler, Cuyahoga, Fayette, Logan, Montgomery, Summit, Trumbull, and Van Wert.

¹⁴⁵ Rural counties Athens, Clinton, Hocking, Logan, and Marion; urban counties Butler, Cuyahoga, Franklin, Hamilton, Mahoning, Montgomery, Stark, and Summit.

Nine courts believed the Academy of Family Mediator Practitioner Qualifications should be the minimal training requirements, which includes a minimum of sixty hours of mediator training. Fifteen courts agree that training should include experience with families; thirteen courts want two years or more, with only two courts wanting the experience requirement lowered.

Perhaps the least debate will be heard over the necessity of continuing education to ensure mediator quality. Nineteen counties agree that some type of continued education requirement should be included in Rule 81. Other issues which may be raised include specific ethical guidelines, pro bono requirements, and sliding fee or flexible fee scale requirements.

Once the testimony has been compiled, the Committee on Dispute Resolution will make its final recommendation to the Supreme Court of Ohio regarding the necessity of changes to be made to interim Rule 81. Possible modifications may include mandatory continuing education for divorce mediators for advanced domestic issues. There is much room for modification in the content of the training to include domestic violence, substance abuse, and ethnic and cultural issues. Possibilities include an increase in the total minimally required hours to accommodate the above training or a requirement that potential divorce mediators must have already acquired basic mediation training before beginning the forty hour minimum divorce training. Another possibility would be to require an apprenticeship or co-mediation model which would pair a trainee with an experienced divorce mediator for a specified period. This would provide an extended observation period in which the mediator's performance could be evaluated and improved.

From the data and testimony collected to date by the author and the Committee on Dispute Resolution, it is apparent that the issue of minimum qualifications for divorce mediators in Ohio courts is ripe for discussion. There may never be statistical data sufficient to conclusively measure those intangible qualities that create a competent, qualified, successful divorce mediator. Interim Rule 81 attempts to define certain minimal requirements that will provide optimal training to ensure process quality. The exit survey may aid by measuring participant perceptions of satisfaction and correlating that information state-wide with the training and qualifications divorce mediators possess. Both aim to improve the quality of divorce mediation in Ohio's court system, which will certainly be a worthwhile investment.

Stephanie Harris